Court, U.S.
FILED
MAR 10 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-585 and 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALOHA AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

BRIEF OF APPELLANT ALOHA AIRLINES, INC. ON THE MERITS

RICHARD L. GRIFFITH
MICHAEL A. SHEA*
RICHARD R. CLIFTON
CADES SCHUTTE FLEMING
& WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200
(*Counsel of Record)

Attorneys for Appellant
ALOHA AIRLINES, INC.

March 1983

QUESTION PRESENTED

Whether a state tax of a specified percentage of an airline's gross income from the airline business, sought to be imposed by the State of Hawaii under Haw. Rev. Stat. § 239-6, is prohibited by 49 U.S.C. § 1513(a), which forbids a state from levying a tax on the gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation, and the supremacy clause of the United States Constitution.

PARTIES TO THE PROCEEDING

On January 10, 1983, this Court ordered that No. 82-585 and No. 82-586 be consolidated. The parties to this consolidated proceeding are Aloha Airlines, Inc. (appellant in No. 82-585), Hawaiian Airlines, Inc. (appellant in No. 82-586), and Director of Taxation, State of Hawaii (appellee in both cases). The United States of America has filed a brief with this Court as *amicus curiae* in support of the position of Appellants, and it had similarly appeared as *amicus curiae* before the Supreme Court of Hawaii. These were all of the parties to the proceedings in the Supreme Court of Hawaii.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	8
ARGUMENT	9
1. The Imposition of the Hawaii Tax on Appellants is Repugnant to the Plain Language of the Federal Statute	9
2. The Hawaii Supreme Court Misapplied the "Pre-emption" Doctrine in Interpreting the Federal Statute Narrowly	16
3. The Legislative History Confirms that Congress Intended to Prohibit the Imposition of This Kind of Tax by the States	18
4. The Decision of the Hawaii Supreme Court Constitutes a Serious Threat to an Important Federal Policy and Program	23
5. The Director's Contention that the Hawaii Tax is a Permitted Property Tax is Erroneous	24
6. The Director's Argument that the 1982 Amendment to 49 U.S.C. § 1513 Supports the Validity of the Hawaii Tax is Erroneous	30
CONCLUSION	33

TABLE OF AUTHORITIES

Cases **Page**

Air Jamaica, Ltd. v. State Dept. of Revenue, 374 So.2d 575 (Fla. Ct. App. 1979), *app. dism.*, 392 So.2d 1371 (Fla. 1980) 15

Air Transport Assn. v. New York State Dept. of Taxation and Finance, No. 43719 (N.Y. App. Div.,3d Dept., Jan. 20, 1983) 14-15, 26

Albernaz v. United States, 450 U.S. 333 (1981) 17

Allegheny Airlines, Inc. v. City of Philadelphia, 453 Pa. 181, 309 A.2d 157 (1973) 15

Apache Gas Products Corp. v. Oklahoma Tax Commission, 509 P.2d 109 (Okla. 1973) 29

Arizona Public Service Co. v. Snead, 441 U.S. 141 (1979) 17-18

California Co. v. State, 141 Colo. 288, 348 P.2d 382 (1959), *app. dism.*, 364 U.S. 285 (1960) 29

Chase Manhattan Bank v. Finance Administration, 440 U.S. 447 (1979) 27

Colautti v. Franklin, 439 U.S. 379 (1979) 13

Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 17

Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976) 27

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707 (1972) 6, 20

Fidelity Federal Savings and Loan Association v. de la Cuesta, _____ U.S. _____ , 73 L.Ed.2d 664, 102 S.Ct. 3014 (1982) 16

First Agricultural National Bank v. Tax Commission, 392 U.S. 339 (1968) 26

Cases **Page**

Galveston, H. & S.A.R. Co. v. Texas, 210 U.S. 217 (1908) 28-29

H & B Communications Corp. v. Richmond, 79 Wash.2d 312, 484 P.2d 1141 (1971) 29

Howe v. Smith, 452 U.S. 473 (1981) 18

In re Aloha Airlines, Inc., 56 Haw. 626, 547 P.2d 586 (1976) 11

Island Airlines, Inc. v. Civil Aeronautics Board, 352 F.2d 735 (9th Cir. 1965) 10

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 17

Maryland v. Louisiana, 451 U.S. 725 (1981) 16

Penn Mutual Indemnity Co. v. Commissioner, 277 F.2d 16 (3d Cir. 1960) 29

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 16

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 10

Schwartz v. Texas, 344 U.S. 199 (1952) 6, 16, 17

Society of Savings v. Bowers, 349 U.S. 143 (1955) 26

State v. Cochise Airlines, Inc., 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980) 13-14, 26

State v. Minneapolis and St. Louis Railway Co., 257 Minn. 124, 100 N.W.2d 669 (1960) 29

Tower Plaza Investments, Ltd. v. DeWitt, 109 Ariz. 248, 508 P.2d 324 (1973), *app. dism.*, 414 U.S. 1118 (1974) 29

United States v. County of Allegheny, 322 U.S. 174 (1944) 31

Virginia v. Imperial Coal Sales Co., Inc., 293 U.S. 15 (1934) 31

Cases **Page**

Weaver v. Prince George's County, 281 Md. 349, 379 A.2d 399 (1977) 29
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) ... 31

Statutes

Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970) 5-6, 19
Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 501-532, 96 Stat. 671 (1982) 30
Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970) 6, 19
Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 (1973) 6
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) 30
15 U.S.C. § 391 17-18
28 U.S.C. § 1257 2
49 U.S.C. § 1301 10
49 U.S.C. § 1305 10
49 U.S.C. § 1513 ..... passim
Haw. Rev. Stat. Chapter 237 ..... 15, 27
Haw. Rev. Stat. § 239-6 ..... passim
Ohio Rev. Code Ann. § 5745.02 (Baldwin) (repealed) .. 15

Legislative History

Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. (1972) 19, 21

Cases **Page**

Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182 and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. 1st Sess. (1973) 22

Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S. 2397, S. 3302, S. 3611 and S. 3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. (1972) 21

H.R. Rep. No. 601, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 3047 19

H.R. Rep. No. 1543, 92d Cong., 2d Sess. (1972) 22

H.R. Rep. No. 1779, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 3773 (1978) 10

119 Cong. Rec. 3349 (1973) 19

S. Rep. No. 12, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News, 1434 ..... 20, 22

S. Rep. No. 1005, 92d Cong., 2d Sess. (1972) 21

H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (Hawaii) 28

1963 House Journal 552 (Hawaii) 28

S.C. Rep. No. 850 Ways and Means on H.b. No. 57, 1963 Senate Journal 950 (Hawaii) 28

Other

Ohio Op. Att'y. Gen. No. 73-117 (1973) 15

Nos. 82-585 and 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALOHA AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

BRIEF OF APPELLANT ALOHA AIRLINES, INC.
ON THE MERITS

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii (with dissenting opinion) is reported at 65 Haw. 1, and 647 P.2d 263. It is reprinted in the Appendix to the Jurisdictional Statement filed by Aloha Airlines, Inc. in No. 82-585 ("Aloha J.S.") at App. 1. The judgment of the Hawaii Supreme Court (Aloha J.S., App. 26) and the decision of the Tax Appeal Court (Aloha J.S., App. 20) have not been officially reported.

JURISDICTION

This action was filed by the appellant, Aloha Airlines, Inc. in order to overturn an assessment against appellant of the Hawaii public service company tax, under Haw. Rev. Stat. § 239-6, on the ground that the assessment is prohibited by a statute of the United States of America, 49 U.S.C. § 1513.

The opinion of the Supreme Court of Hawaii was announced on June 23, 1982, and Judgment was entered in accordance therewith on July 7, 1982. The decision of the Supreme Court of Hawaii upheld the assessment of the Hawaii public service company tax. Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. Aloha Airlines, Inc. filed its Jurisdictional Statement on October 4, 1982. Probable jurisdiction was noted on January 10, 1983.

The jurisdiction of the United States Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2). In this case the validity of a statute of Hawaii, Haw. Rev. Stat. § 239-6, is drawn into question because of its being repugnant to a law of the United States, 49 U.S.C. § 1513, and the decision of the Supreme Court of Hawaii was in favor of validity of the Hawaii statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The federal and state statutes which are at issue in this case, 49 U.S.C. § 1513(a) and (b) and Haw. Rev. Stat. § 239-6, are set out in full in the Appendix to the Jurisdictional Statement filed by Aloha Airlines, at App. 30. The relevant portions are presented here. 49 U.S.C. § 1513(a) and (b) provide, in relevant part:

> § 1513. *State taxation of air commerce*
>
> *Prohibition; exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissible State taxes and fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .

Haw. Rev. Stat. § 239-6 provides, in relevant part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . . the tax shall be three percent of its gross income each year from the airline business. . . . The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

The Director of Taxation has asserted that 49 U.S.C. § 1513(d), added to the statute in 1982, is relevant to these

proceedings; Aloha Airlines, Inc. asserts that it is not. The full text of 49 U.S.C. § 1513(d) is set out in the Appendix to Appellant's Brief Opposing Motion to Dismiss or Affirm, filed on behalf of Aloha Airlines, at App. 1. The 1982 legislation also modified the language of 49 U.S.C. § 1513(b) slightly by inserting the phrase "Except as provided in subsection (d) of this section," at the beginning. Subsection (b) is quoted above and throughout this brief as it read during the years in question, before the 1982 amendment. There is no substantive difference.

STATEMENT OF THE CASE

Aloha Airlines, Inc.[1] (hereinafter "Aloha Airlines") is a commercial airline which carries persons, freight and mail between various islands of the State of Hawaii.[2] (Joint Appendix, hereinafter "J.A.," 6) Aloha Airlines' flights between these islands cross international waters. (J.A. 11) As a result, Aloha Airlines operates its flights under authority of a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board and is subject to the continuing regulation of the Board. (J.A. 6)

During the four years directly at issue in this case, 1974 through 1977, Aloha Airlines was required under Haw. Rev. Stat. § 239-6 to pay the Hawaii public service company tax, computed as a percentage of its gross income from the airline

---

[1] Except for a wholly owned subsidiary, Aloha Airlines, Inc. has no affiliates, parent companies, or subsidiaries.

[2] Aloha Airlines' principal place of business is in Honolulu, Hawaii. However, Aloha Airlines has permanent sales offices located in six other states as well as in Canada and Japan. (J.A. 12) Tickets on Aloha Airlines' flights are sold world-wide in conjunction with tickets on connecting flights of other airlines. Most of Aloha Airlines' passengers are persons whose travel began somewhere outside of Hawaii. (J.A. 7-8)

business.[3] Aloha Airlines timely filed a claim for the refund of the taxes on its gross receipts from the transportation of persons on the basis that such imposition of the public service company tax violated 49 U.S.C. § 1513. The Hawaii Director of Taxation (hereinafter "Director") denied the claim for refund, and Aloha Airlines took an appeal to the Hawaii Tax Appeal Court.

On June 9, 1978 the Hawaii Tax Appeal Court ruled that the imposition of the tax was not prohibited by 49 U.S.C. § 1513. (Aloha J.S., App. 20) Aloha Airlines timely appealed to the Hawaii Supreme Court. Hawaiian Airlines, Inc., another commercial airline with headquarters in Hawaii and the appellant in No. 82-586 before this Court, filed a similar tax appeal. The Aloha Airlines, Inc. appeal and the Hawaiian Airlines, Inc. appeal were consolidated for argument before the Supreme Court of Hawaii. In addition, the United States of America, *amicus curiae*, filed a brief and participated in oral argument with respect to the consolidated appeal. The United States joined both airlines in arguing that the imposition of the tax on the airlines was prohibited by the federal statute.

On June 23, 1982 the Supreme Court of Hawaii entered the opinion which is the subject of this appeal. (Aloha J.S., App. 1) The Hawaii Supreme Court held that the imposition of the public service company tax, Haw. Rev. Stat. § 239-6, was not prohibited by 49 U.S.C. § 1513 or in violation of the supremacy or commerce clauses of the United States Constitution.

In its opinion, the Supreme Court of Hawaii discussed the original purposes of the Airport and Airway Development Act

---

[3] The amounts of tax in controversy are $811,565.27 for 1974; $979,243.67 for 1975; $1,071,892.57 for 1976; and $1,367,756.00 for 1977, or a total of $4,230,457.51. (J.A. 6) Interest on the sums paid is also at stake in this litigation. In addition, since the controversy is a continuing one, similar assessments for later years remain in dispute.

of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970), and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970), concluding that the legislation was designed to provide for expansion and improvement of the Nation's airport system financed through a series of user taxes. (Aloha J.S., App. 6) The court further examined the motivation of Congress in passing the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88 (1973), which included the provision primarily at issue, 49 U.S.C. § 1513. The Hawaii Supreme Court concluded that the 1973 legislation was simply motivated by increased revenue needs as well as the fear that the decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), would lead to "a proliferation of similar charges at airports throughout the country." (Aloha J.S., App. 8)

The Hawaii Supreme Court then considered the language of 49 U.S.C. § 1513. The court recognized that "read literally, the subsection [49 U.S.C. § 1513(a)] decrees a federal preemption of the entire field of commercial aviation taxes," but concluded that 49 U.S.C. § 1513(b) "demonstrates that Congress could not have intended so broad a preemptive sweep." The court therefore concluded that its task was to "harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b)." (Aloha J.S., App. 9)

Examining the question of federal preemption of the Hawaii public service company tax, the court stated that "there is no unerring test to determine just when a state provision is without effect by reason of preemption." (Aloha J.S., App. 12) The court relied upon *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), for the proposition that:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

(Aloha J.S., App. 13)

Having concluded that there is no infallible test of preemption, the court determined that legislative intent must be relevant and drew its own inferences as to what Congress had intended to accomplish by enacting 49 U.S.C. § 1513. It concluded that Congress had not intended to preempt any major taxes or primary revenue sources of the states. (Aloha J.S. App. 14-15) Instead, the court concluded that Congress intended primarily to preempt "head" or ticket taxes collected directly from shippers and passengers, those local charges most likely to cause delay or confusion among customers. (Aloha J.S. App., 15-16) Because the Hawaii public service company tax is collected from the airlines, the court concluded that it did not invade the area targeted for prohibition. (Aloha J.S., App. 16)

The court also concluded that the imposition of the Hawaii tax was not incompatible with federal legislation because simultaneous compliance with the federal and state tax laws was not a physical impossibility. Since the airlines could pay both taxes, the court ruled that the federal law did not mandate invalidation of the Hawaii tax. (Aloha J.S., App. 17)

Justice Marumoto filed a dissenting opinion. He concluded that the plain language of the federal statute is controlling under the supremacy clause:

> In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):
>
> > No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom

> prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases. (ellipses in original)

(Aloha J.S., App. 18)

Judgment was entered in accordance with this opinion on July 7, 1982. The Notice of Appeal was filed with the Supreme Court of Hawaii on August 6, 1982. Aloha Airlines filed its Jurisdictional Statement to this Court on October 4, 1982. Probable jurisdiction was noted on January 10, 1983.

SUMMARY OF ARGUMENT

1. The imposition of the Hawaii public service company tax, under Haw. Rev. Stat. § 239-6, is contrary to the plain language of 49 U.S.C. § 1513. The federal statute prohibits the collection of a tax "on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." The Hawaii tax, collected as a percentage of "gross income each year from the airline business," falls squarely within the federal prohibition.

2. The decision of the Hawaii Supreme Court rests upon a misunderstanding of the "pre-emption" doctrine. In this case, the intent to displace state authority is explicit, since the federal statute expressly prohibits the states from acting in a certain manner. It was inappropriate, therefore, for the Hawaii court to read the federal statute narrowly on the premise that Congress did not intend to supersede state authority.

3. The legislative history behind 49 U.S.C. § 1513 confirms that Congress intended to prohibit the imposition of this kind of tax by the states. Congress meant to reserve this area exclusively for federal taxation, levied to finance the federal program to aid airport development. In enacting the relevant provision, Congress was aware of an existing gross receipts tax

in at least one other state, yet it resisted pleas to modify the proposed legislation to permit such taxation.

4. The decision of the Hawaii Supreme Court constitutes a serious threat to the important federal policy and program to promote civil aviation and develop an efficient air transportation system.

5. The Director's contention that the Hawaii tax is a permitted property tax is erroneous. The federal statute does not permit the imposition of any and every tax characterized as a "property" tax. Even if so labelled, a tax on gross receipts, such as Hawaii's, is prohibited. Moreover, the Hawaii tax cannot be deemed a property tax for federal purposes or within the meaning of 49 U.S.C. § 1513(b).

6. The Director's argument that the 1982 amendment to 49 U.S.C. § 1513 supports the validity of the Hawaii tax is erroneous. That amendment does not alter the relevant portions of § 1513. If anything, the 1982 legislation demonstrates that Congress did not intend to permit state taxes like Hawaii's and offers an additional ground for barring the tax for years subsequent to 1982.

ARGUMENT

1. THE IMPOSITION OF THE HAWAII TAX ON APPELLANTS IS REPUGNANT TO THE PLAIN LANGUAGE OF THE FEDERAL STATUTE.

At issue here is whether by enacting 49 U.S.C. § 1513, Congress has prohibited the application of a tax such as the one imposed by the State of Hawaii on Aloha Airlines and on Hawaiian Airlines. It is, therefore, the interpretation of a federal statute, 49 U.S.C. § 1513, which is in question.

The first rule of statutory construction is that such an examination must begin with the statutory language. "The starting

point of our inquiry is the plain language of the statute itself." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

In this instance Congress has clearly and unambiguously exercised its commerce clause power to prohibit the imposition of any state tax on the gross receipts derived from the sale of air transportation, by providing in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . ., directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or *on the gross receipts derived therefrom* . . . (emphasis added)

The terms "air commerce" and "air transportation" are defined by federal statute and include the operations of Aloha Airlines which are at issue here.[4]

Congress could hardly have been broader or clearer in its prohibition. First, the language forbids every form of state exaction: "a tax, fee, head charge, or other charge." Second, the statute broadly defines what is protected from state taxation, by prohibiting charges (1) on persons traveling, (2) on the

---

[4] "Air commerce" is defined to include air carriage between two places within a single state which passes "through the air space over any place outside thereof." 49 U.S.C. §§ 1301 (4) & (23)(a) (1970 & 1982 Supp.). Similarly, "air transportation" is defined to include the transportation of persons and property by air between two places within a single state "through the air space over any place outside thereof." 49 U.S.C. §§ 1301 (10) & (24)(a) (1970 & 1982 Supp.). Aloha Airlines' flights are limited to flights between the islands of Hawaii. Nonetheless, its operations are covered by federal regulation and this statute because those flights pass over the high seas, i.e., the international waters between the islands of Hawaii. See *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (9th Cir. 1965). In the Airline Deregulation Act of 1978, Congress confirmed that Hawaii interisland flights constitute "interstate or overseas air transportation," by adopting what is now 49 U.S.C. § 1305(b)(2). *See* H.R. Rep. No. 95-1779, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3773, 3805. The opinion of the Hawaii Supreme Court did not rest on any contrary conclusion.

carriage of persons, (3) on the sale of transportation, and (4) on the gross receipts derived therefrom. Finally, lest there be any gaps, Congress further defined the prohibition broadly, so as to circumvent evasion, by including the phrase "directly or indirectly."

The Hawaii public service company tax is just such a tax levied or collected on the gross revenues derived from the sale of air transportation. Haw. Rev. Stat. § 239-6 provides in relevant part:

> There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business.[5]

The language of § 239-6 is clear. In fact, the Hawaii Supreme Court has confirmed that the public service company tax imposed on "gross income from the airline business," is to be levied and collected on the "gross receipts" from the sale of air transportation. In *In re Aloha Airlines, Inc.*, 56 Haw. 626, 547 P.2d 586 (1976), the Hawaii Supreme Court affirmed a decision of the Tax Appeal Court that "commissions retained by travel agents from *the proceeds of sales of air passage* on Appellant's flights are includable in Appellant's *taxable gross income*." 56 Haw. at 626, 547 P.2d at 586 (emphasis added). There can be no doubt, therefore, that the tax imposed by § 239-6 is levied

---

[5] Because Aloha Airlines has adopted a discount rate schedule for school groups as provided in the statute, the tax which the State of Hawaii has attempted to impose upon Aloha Airlines has been three per cent of its gross income each year from the airline business.

and collected on Aloha Airlines' gross receipts from the sale of air transportation.

By virtue of 49 U.S.C. § 1513(b), the Hawaii Supreme Court purported to find "seeming contradictions" within the language of 49 U.S.C. § 1513, allegedly sufficient to require examination of legislative intent and ultimately to open the door for the Hawaii tax. (Aloha J.S., App. 9) No such contradiction actually exists, though, as the language of § 1513(b) clearly does not negate the effect of § 1513(a):

> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added).

It is clear from the statutory language that Congress did not undo the prohibition stated in subsection (a). Rather, Congress merely sought to avoid the possibility that the "directly or indirectly" language in subsection (a) would be taken so broadly as to prohibit any state taxation whatsoever of airlines, as "indirectly" being on their gross receipts. Thus, an airline is not immune from customary real property taxes on land and buildings owned by the airline, merely because the money to pay those taxes would come from its revenues.[6] But taxes enumerated in subsection (a), including taxes levied or collected on the sale of air transportation or the gross receipts derived therefrom, are forbidden in any form or guise.

---

[6]The State of Hawaii imposes real property taxes for airport lands upon the airlines under their airport lease agreements. Aloha Airlines or its subsidiaries paid real property taxes with respect to airport system property in the amount of approximately $30,000 for each of the tax years 1974 through 1977 (J.A. 11). These taxes are not contested and are not in dispute here.

The interpretation offered by the Hawaii Supreme Court is, therefore, directly contrary to the plain language of 49 U.S.C. § 1513. Moreover, since the Hawaii Supreme Court's interpretation of subsection (b) of that statute would, in effect, frustrate the provision contained in subsection (a), it violates a second fundamental rule of statutory construction, which is "that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). If a tax which requires Aloha Airlines to pay a levy of three percent of "its gross income each year from the airline business" does not constitute a tax "directly or indirectly . . . on the sale of air transportation or on the gross receipts derived therefrom," then the entire federal statute has been rendered meaningless, inoperative, and insignificant. In the words of the Brief for the United States as Amicus Curiae in Support of Appellants, at pages 1-2, filed in these appeals before probable jurisdiction was noted, "the Hawaii tax is a flagrant violation of federal law."

To date there have been few judicial interpretations of 49 U.S.C. § 1513, and this Court has never reviewed the question at issue here. In certain jurisdictions, state taxing authorities have attempted to assert that state taxes measured by gross receipts are enforceable despite the prohibition of 49 U.S.C. § 1513. Except for this decision of the Hawaii Supreme Court, though, the courts in those states have refused to sustain this kind of tax against challenges based upon 49 U.S.C. § 1513(a).

The State of Arizona attempted to impose a tax of one per cent on the gross proceeds of sales or gross income of companies engaged in the business of transporting passengers or freight by aircraft. In *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), the Arizona Court of Appeals held the imposition of the tax on passenger revenue to be prohibited by 49 U.S.C. § 1513(a). In its effort to defend the

tax, the Arizona Department of Revenue presented arguments similar to those underlying the opinion of the Hawaii Supreme Court. Specifically, the state argued that congressional intent was relevant, and that only the "head tax" was the target of the congressional prohibition. 128 Ariz. at 434, 626 P.2d at 598. Further, the state argued that the privilege tax was analogous to a sales tax excepted from 49 U.S.C. § 1513(a) by 49 U.S.C. § 1513(b). 128 Ariz. at 435, 626 P.2d at 599. Nonetheless, the court concluded that the Arizona tax on passenger revenue was barred by the federal statute:

> In our opinion, the plain terms of the federal act strike directly at the subject Arizona privilege tax, and leave no room for a construction which permits a tax on the business of carrying persons.

128 Ariz. at 435, 626 P.2d at 599.

New York has attempted to apply a "franchise" tax applicable to air carriers at the rate of three-quarters of one per cent of gross earnings. In *Air Transport Assn. v. New York State Dept. of Taxation and Finance*, No. 43719 (N.Y. App. Div., 3d Dept., Jan. 20, 1983), the New York tax was challenged on the ground that it was prohibited by 49 U.S.C. § 1513(a). The state argued that "franchise taxes" are authorized by § 1513(b). It further contended that the New York tax was "on" the privilege of doing business, including categories of income other than that protected by § 1513(a), rather than "on" gross receipts derived from air carriage, and therefore was not prohibited. Nevertheless, the New York tax was held to be prohibited by 49 U.S.C. § 1513.[7] The Appellate Division had little difficulty in brushing aside the state's arguments:

---

[7]The New York Department of Taxation has filed a notice of appeal from this decision.

> In our opinion, the plain terms of section 1113 of the Federal Aviation Act [49 U.S.C. § 1513] strike directly at the subject tax, and do not allow for a construction which permits a tax either directly or indirectly on gross receipts derived from air transportation.

Air Transport Assn. v. New York Dept. of Taxation and Finance, slip op. at 3.[8]

It should also be noted that Ohio previously imposed an excise tax, measured as a percentage of gross receipts, on the privilege of engaging in the business of transporting persons or property by air within that state. After the adoption of 49 U.S.C. § 1513, the Attorney General of the State of Ohio rendered an opinion to the state tax commissioner that this tax was prohibited by the federal statute, leading to the legislative repeal of the Ohio tax. See Ohio Rev. Code Ann. § 5745.02 (Baldwin); Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973).[9]

---

[8]The New York case was argued and decided after the announcement of the Hawaii decision on appeal here. The New York court was aware of the Hawaii opinion but explicitly rejected its reasoning, citing it as "but see" authority. Slip op. at 4.

[9]See also *Allegheny Airlines, Inc. v. City of Philadelphia*, 453 Pa. 181, 309 A.2d 157 (Pa. 1973), in which the Pennsylvania Supreme Court merely cited the federal statute and struck down an attempt by the City of Philadelphia to impose a flat charge for each passenger embarking at the city's airport.

Litigation is currently in progress in Alaska, *Wien Air Alaska, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-8582 (filed December 10, 1981), and *Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue*, State of Alaska, Superior Court Appeal No. 3AN-81-4286 (filed June 22, 1981).

In *Air Jamaica, Ltd. v. State Dept. of Revenue*, 374 So.2d 575 (Fla. Dist. Ct. App. 1979), *app. dism.* 392 So.2d 1371 (Fla. 1980), a state sales tax was upheld despite a challenge based upon several grounds, including an argument that 49 U.S.C. § 1513 prohibited the levy. The transaction subject to the tax, however, was the sale to the airlines of prepackaged meals. This appeal does not involve sales of goods to Aloha Airlines. Hawaii has a general excise tax, Haw. Rev. Stat., Ch. 237. Sales of goods to Aloha Airlines are taxable under that chapter and are not in dispute here.

It is natural for any state taxing authority to put forth every conceivable argument and rationale in an attempt to justify a state tax, and the same can be expected here. To date, however, such efforts have failed, except in Hawaii. Other states have recognized that 49 U.S.C. § 1513(a) forbids taxation of this kind. So, too, should this Court hold. The plain language of the federal statute permits no other conclusion.

2. **THE HAWAII SUPREME COURT MISAPPLIED THE "PRE-EMPTION" DOCTRINE IN ENDEAVORING TO READ THE FEDERAL STATUTE NARROWLY.**

In its opinion the Supreme Court of Hawaii purported to interpret the prohibitive reach of 49 U.S.C. § 1513 according to the principles set forth in several decisions of this Court concerning the pre-emption doctrine. The analysis of the Hawaii Supreme Court was fundamentally flawed, however. The decisions which it cited and relied upon involved federal statutes and regulations which did not expressly limit the authority of the state, but rather which implicitly imposed potential conflicts. In those cases, it was necessary to determine whether it was the intent of Congress in each such case to displace the state authority. It was in such context that this Court has observed that it should not be lightly inferred that Congress has intended to pre-empt the state's authority.[10]

The present case poses a different situation, however. Pre-emption may be "either express or implied." *Fidelity Federal Savings and Loan Association v. de la Cuesta,* U.S. , ,

---

[10] *See Maryland v. Louisiana,* 451 U.S. 725, 746 (1981); *Schwartz v. Texas,* 344 U.S. 199, 202-03 (1952); and *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). These were the authorities cited to this effect by the Hawaii Supreme Court. (Aloha J.S., App. 13-14.)

73 L.Ed.2d 664, 675, 102 S.Ct. 3014, 3022 (1982). Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, the pre-emption is explicit. The federal statute involved, 49 U.S.C. § 1513, prohibits certain state taxation, in so many words. Even by the standard quoted by the Hawaii court, from *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), pre-emption is plain, since the statute constitutes "a clear manifestation of intention" to "supersede the exercise of the power of the state." Indeed, statutory language represents the clearest such manifestation possible.

There is no room here, therefore, for any presumption that Congress did not intend to exercise federal supremacy or for extraordinary efforts to read the federal statute narrowly. That statute does not leave such pre-emption to be inferred; rather, it spells it out precisely. "Absent a 'clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Albernaz v. United States*, 450 U.S. 333, 336 (1981), quoting *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Thus, when the Court has been presented with cases involving express prohibitions of state taxation, as opposed to allegedly implied pre-emption of state authority, it has applied and enforced the prohibition without reference to the authorities relied upon by the Hawaii court. For example, in *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979), the issue was whether the New Mexico "electrical energy tax" was barred by 15 U.S.C. § 391, which prohibited any state from imposing a tax on the generation of electricity which discriminated against out-of-state residents. In reaching the conclusion that the New Mexico tax could not be imposed, the Court simply examined the state tax and determined that it was within

the confines of the explicit prohibition stated by Congress in 15 U.S.C. § 391.

Where Congress has, by the language of a federal statute, explicitly prohibited or restricted the authority of the states, its action must be given effect. The application of a presumption in favor of the state statute or of a notion that the federal statute should be narrowly construed violates the supremacy clause of the United States Constitution. The decision of the Hawaii Supreme Court confused this Court's decisions concerning "implied pre-emption" with the more applicable "express prohibition" precedents, thereby failing to give adequate recognition to federal supremacy. The decision of the Hawaii Supreme Court must therefore be reversed.

3. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROHIBIT THE IMPOSITION OF THIS KIND OF TAX BY THE STATES.

As established above, the language of 49 U.S.C. § 1513(a) is plain in prohibiting the application of this tax by the State of Hawaii on Aloha Airlines. Further, that language must ordinarily be deemed conclusive. "When the terms of a statute are unambiguous, our inquiry comes to an end, except in rare and exceptional circumstances." *Howe v. Smith*, 452 U.S. 473, 483 (1981) (citations and internal quotations omitted).

The Hawaii Supreme Court, nevertheless, relied upon its reading of the legislative history to conclude that Congress intended to prohibit only "head" taxes and taxes imposed directly upon the passengers and freight users of the aviation system, rather than taxes imposed on airlines. (Aloha J.S., App. 15-16.) That view cannot be squared with the language in 49 U.S.C. § 1513(a) prohibiting taxation of "the gross receipts derived therefrom;" if Congress meant to forbid only head

taxes it would not have included words which could only refer to the airlines. Nor does the legislative history support the conclusion of the Hawaii court. Indeed, the clear expression of legislative intent is quite to the contrary, for it is plain, from a brief review of this section's history, that Congress intended to forbid the imposition of taxes such as this one.

The relevant history began with the enactment in 1970 of the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, § 1-53, 84 Stat. 219 (1970) and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, § 201-11, 84 Stat. 236 (1970). These acts were adopted to provide federal assistance in the development and expansion of the nation's airport system. The program was to be primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. See H.R. Rep. No. 601, 91st Cong. 2d Sess. 35-36, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3047, 3082.

It was intended that the 1970 legislation would provide a uniform system of taxation for air transportation with the federal tax being the only tax imposed upon the air transportation system. See Statements of Senators Cannon and Pearson, 119 Cong. Rec. 3349-50(1973). Consistent with that view, the first version of what later became 49 U.S.C. § 1513 was introduced in the House of Representatives a few months later, on January 26, 1971. This bill, H.R. 2337, provided in relevant part that:

> No state . . . shall levy or collect a tax, fee, or other charge, directly or indirectly, on the carriage of persons in air transportation . . .[11]

---

[11] See Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 2d Sess. 24 (1972).

No action was taken on the bill in 1971, but other bills on the subject were introduced, and in the spring of 1972, Congress began a review of the airport development program which had been created by the 1970 legislation. Shortly after a Senate subcommittee opened hearings on the subject, it was held in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), that states and municipalities were not forbidden from imposing "head taxes" on air passengers or on air carriers.

Congress viewed this possibility as a direct threat to the federal airport and airway program established in 1970 and broadened its review to include the possible effects of *Evansville*. The Senate Committee on Commerce expressed strong concern over the kind of taxation permitted by the *Evansville* decision because it believed such taxes would probably increase the cost and discourage the use of air travel. S.Rep. No. 12, 93rd Cong., 1st Sess. 17-22, *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1446-51. The Senate Committee therefore determined that legislation was necessary to forbid state taxation on the carriage of passengers by air in order to protect a rational program of airport development funded by a uniform federal tax. *Id.* at 1455.

Thus, Congress moved to enact a broad prohibition against state taxation. In question were more than just the "head taxes" discussed in *Evansville*. In congressional hearings Whitney Gillilland of the Civil Aeronautics Board expressed the Board's concerns about a possible proliferation of state and local air transportation taxes and he referred specifically to an Ohio tax

on the gross receipts of an airline business.[12] That Ohio tax, levied on airlines and measured by four per cent of the gross receipts of the airline from the activity, was virtually identical in function and measure of tax to the Hawaii public service company tax, and it was plainly contemplated that the Ohio tax was covered by various bills then under consideration.

A bill introduced a short time thereafter by Senator Cannon, S.3755, expanded the prohibition against state and local taxation specifically to cover state gross receipts taxes on airlines. Section 1113 of the bill provided, in relevant part:

> No state (or political subdivision thereof) shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of persons in air transportation, *or on the gross receipts derived therefrom* . . . (emphasis added)

S. Rep. No. 1005, 92d Cong., 2d Sess. 4 (1972). The "gross receipts" language, added after Mr. Gillilland's testimony noted the Ohio tax on gross receipts, was included for the purpose of expressly barring taxes of that nature.

This bill was considered by the Senate Committee on Commerce on June 28, 1972, and resulted in an amended version of S. 3755, introduced August 1, 1972. This amended version contained language (in § 1113) similar to that which was finally enacted in 49 U.S.C. § 1513, the statute at issue here.

---

[12] Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings on S.2397, S.3302, S.3611 and S.3755 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong. 2d Sess. 136 (1972) (Statement of Whitney Gillilland); Air Passenger Fees—State and Local Charges: Hearings on H.R. 2337, H.R. 14847, and H.R. 10326 (and Identical Bills) Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92d Cong. 2d Sess. 52 (1972) (Statement of Whitney Gillilland).

The language of S. 3755, as amended, was adopted by the Senate-House Conference Committee. H.R. Rep. No. 1543, 92d Cong. 2d Sess. 1-3 (1972). The Senate and the House both passed the bill as reported by the Conference Committee. Ultimately, however, the bill was pocket-vetoed by President Nixon on October 27, 1972, for reasons unrelated to the provision at issue here.

The legislation was taken up again by the 93rd Congress when it convened the following year. The Senate adopted as S. 38 language similar to that which the Conference Committee had agreed upon in 1972. S. Rep. No. 12, 93d Cong. 1st Sess. 6 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1436.

In the meantime, hearings on the airport development program were held before a House subcommittee in March 1973. At that time, the Ohio gross receipts tax was again specifically examined. Theodore Koetz, Ohio deputy tax commissioner, argued for the fairness of state gross receipts taxes and urged adoption of an exemption from the proposed federal prohibition for certain state gross receipts taxes.[13] Despite this appeal, his proposed language was rejected. In clear recognition that the legislation would bar state gross receipts taxes, and with the intent to do so, Congress passed the proposed legislation. When signed by the President on June 18, 1973, the prohibition became law as 49 U.S.C. § 1513.

Thus, there is no conflict whatsoever between the legislative history of 49 U.S.C. § 1513 and the plain language of the

---

[13] Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S.38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. 1st Sess. 246-53 (1973) (Statement of Theodore Koetz).

statute. Congress meant what it said when it prohibited the imposition of all state taxes on gross receipts from the sale of air transportation. Because the decision of the Hawaii Supreme Court depends on the opposite conclusion, it cannot be sustained.

4. THE DECISION OF THE HAWAII SUPREME COURT CONSTITUTES A SERIOUS THREAT TO AN IMPORTANT FEDERAL POLICY AND PROGRAM.

Before probable jurisdiction was noted, the United States filed a brief as amicus curiae in support of the airlines' positions in these appeals. It summarized, at page 2, the concern which motivated that filing:

> Section 1513(a) was enacted as part of the federal Airport Development Aid Program, under which federal assistance is provided to states and localities for airport improvements. This assistance is drawn from the Airport and Airway Trust Fund, which is in turn replenished by certain federal aviation taxes. Congress enacted Section 1513(a) to prevent excessive taxation of airlines and thus safeguard both the Airport Development Aid Program and the nation's system of civil aviation. Promoting air commerce and the development of an efficient air transportation system have long been important federal objectives (see 49 U.S.C. (Supp. IV) 1302, 1303, and 49 U.S.C. 1346). The Hawaii tax at issue here threatens these goals by imposing a prohibited tax on airlines at a time of general financial distress in the airline industry.

The brief filed on behalf of the United States goes on to explain its concern and the bases for its conclusions in detail. Aloha Airlines agrees with and adopts the discussion therein.

The opinion of the Hawaii Supreme Court did not dispute the power of Congress, under the commerce and supremacy clauses of the United States Constitution, to limit or prohibit this kind of state taxation. Where Congress has determined to do so because it has concluded that a program is important to promote or regulate interstate commerce, it is not for the states to second-guess the congressional determination.

5. THE DIRECTOR'S CONTENTION THAT THE HAWAII TAX IS A PERMITTED PROPERTY TAX IS ERRONEOUS.

In his Motion to Dismiss or Affirm, the Director argued to this Court that the Hawaii public service company tax was a "property tax," and thus was specifically authorized by § 1513(b). That was a ground not relied upon by the Hawaii Supreme Court in its decision. The most that the Hawaii court concluded was that it "would not quarrel" with the legislative characterization of the tax as a tax on personal property, since "the tax has some attributes of a property tax." (Aloha J.S., App. 16.) The Hawaii Supreme Court did not explicitly hold either that the tax was a "property tax" within the meaning of 49 U.S.C. § 1513(b), or that § 1513(b) expressly permits, as argued by the Director, anything characterized as a property tax. Nonetheless, the Director has asserted this justification.

The Director's argument is fatally flawed, in two separate ways. First, his position is based on an erroneous reading of the federal statute, since subsection (b) does not expressly permit the imposition of any and every tax characterized as a "property tax." Second, the Hawaii public service tax is not, for purposes of federal law, a "property tax" as meant by subsection (b). For both of these reasons, the Director's argument must fail.

(a) The Director's position is premised on an erroneous reading of 49 U.S.C. § 1513.

The Director's misunderstanding of the federal statute is

apparent from his statement of the "Question Presented." As stated on page 1 of his Motion to Dismiss or Affirm, he perceives the question to be:

> Whether a Hawaii tax is a property tax or a gross receipts tax. If it is property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

The Director's characterization of the question is wrong because 49 U.S.C. § 1513 provides no basis for such an "either-or" approach. Subsection (a) of the statute prohibits a state from levying a tax on gross receipts derived from the carriage of persons traveling in air commerce or on the sale of air transportation. The Director has not disputed that interpretation. Contrary to the Director's statement, however, subsection (b) does not "expressly permit" any and every tax termed a "property tax." Rather, subsection (b) states, in relevant part:

> Nothing in this section shall prohibit a State . . . from the levying or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services . . . (emphasis added)

The prohibition stated in subsection (a) is controlling, and nothing in subsection (b) authorizes a State to evade that prohibition merely by labelling a tax on gross receipts a "property tax." Since Hawaii's tax is measured by gross receipts, and since such a tax is enumerated in and forbidden by subsection (a), the rest of subsection (b) is irrelevant.

The same arguments were raised in the state court cases discussed above concerning the similar taxes in Arizona and New York. The Arizona Department of Revenue attempted to justify its tax under subsection (b) as a "sales" tax, while in

New York the tax authorities claimed that their tax was authorized as a "franchise" tax. The courts in those cases had no trouble disposing of those arguments. See *State v. Cochise Airlines, Inc.*, 128 Ariz. at 437, 626 P.2d at 601; *Air Transport Assn. v. New York State Department of Taxation and Finance*, slip op. at 3-4.

(b) **The Hawaii tax cannot be deemed a property tax for federal law purposes.**

Moreover, even if § 1513(b) were interpreted to expressly authorize the imposition of a "property tax," the Hawaii tax at issue here cannot be viewed as a property tax. For purposes of federal statutory interpretation, this Court is not bound by the state's label. Regardless of how Hawaii characterizes its tax, the question of whether the tax comes within the description of § 1513(b) must be resolved as a matter of federal law, not state law, and with particular reference to the purpose of the prohibition of § 1513(a).

While there are no reported cases construing the "property tax" clause of 49 U.S.C. § 1513(b), it is well established in comparable situations that state law is not determinative of the meaning of federal statutory provisions. For example, in *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), the question arose whether a Massachusetts sales tax was improperly imposed upon a plaintiff national bank as a purchaser of personal property or was validly assessed upon vendors who sold the property to the bank. The *First Agricultural National Bank* opinion noted that the incidence of the tax was a matter of federal law, and stated:

> Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax. *See Society for Savings v. Bowers*, 349 U.S. 143, 151.

392 U.S. at 347. Similarly, see *Chase Manhattan Bank v. Finance Administration*, 440 U.S. 447, 449 (1979); and *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976).

This Court is not, therefore, bound to accept the state's characterization of its tax. When the Hawaii public service tax is examined, it is clear that it is not a "property tax," as that term is commonly understood or as is meant in § 1513(b).

The only thing which may be offered to support the characterization of the Hawaii tax as a property tax is its self-description. The Hawaii statute, Haw. Rev. Stat. § 239-6, reads in part:

> The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

That description cannot be taken at face value.

The "property tax" label is clearly a sham to be disregarded for any substantive purpose. This is not a substitute for any generally imposed personal property tax. As observed in the dissenting opinion of Justice Marumoto, Hawaii does not even have a personal property tax at this time, nor did it have one when this statute was enacted. (Aloha J.S., App. 18) Indeed, Hawaii has not assessed a personal property tax since 1947. In addition, the tax referred to as imposed by Chapter 237 is not a personal property tax but rather a general excise tax, collected as a percentage of gross income.

Examination of the legislative history behind § 239-6 reveals that the sole and express purpose of its characterization as a "personal property" tax was to protect the tax from federal constitutional attack. At that time, in 1963, 49 U.S.C. § 1513 had not yet been enacted, so the Hawaii legislature's concern

was with constitutional limitations. The relevant House Finance Committee Report states that:

> The purpose of this bill is to protect from attacks of unconstitutionality on the basis of the commerce clause the tax on . . . airlines . . . by clearly *characterizing* the tax as a property tax, measured by gross income.

H.C. Rep. No. 792 Finance on H.B. No. 57, 1963 House Journal 799 (emphasis added). Similarly, see S.C. Rep. No. 850 Ways and Means on H.B. No. 57, 1963 Senate Journal 950. In the House floor debate preceding final passage of the bill, according to the official record: "Representative McClung explained that the bill would put all taxable business . . . under one tax statute to *get around* the problem of interstate commerce." 1963 House Journal 552 (emphasis added).

The totally artificial nature of the property tax label is confirmed by an examination of the tax returns. The forms prepared by the state and used by Aloha Airlines to file its 1974, 1975, 1976 and 1977 Hawaii public service company tax returns contain no schedule, list or valuation of any property owned by Aloha Airlines. A specimen Hawaii public service company tax return, Form U-6, is shown at J.A. 35. In fact, the filing of the Form U-6 return requires no mention of any property of any kind owned or leased. Item 10 of the "General Explanation of the Public Service Company Tax and Instructions for Filing Form U-6," issued by the Department of Taxation (J.A. 50), provides that airlines shall report gross income on Form U-6, page 1, and compute the tax due—no other information is required. In actual operation, the Hawaii tax purports by its instructions to act and, in fact, does act only to tax gross receipts, and not the property of any airline or other taxpayer.

Under these circumstances, an artificial label cannot be given any weight. In *Galveston, H. & S.A.R. Co. v. Texas*, 210

U.S. 217 (1908), this Court struck down an attempt to validate an unconstitutional tax by the use of a label:

> A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, *by giving the tax a particular name or by the use of some form of words*, can take away our duty to consider its nature and effect.

210 U.S. at 227 (emphasis added). Relying upon this and similar principles, both state and federal courts have repeatedly refused to raise artificial "property tax" labels to the level of substance.[14]

The whole point of 49 U.S.C. § 1513 is to preclude state and local governments from imposing certain taxes, including gross receipts taxes, upon air transportation. It would make no sense to permit Hawaii to impose a tax with exactly the same effect, merely because it was styled as a "property" tax rather than as a "gross receipts" tax. Surely Congress could not have intended to make it so easy to evade the federal statute. The Hawaii public service company tax cannot, therefore, be sustained as a property tax.

---

[14] See, e.g., *Weaver v. Prince George's County*, 281 Md. 349, 379 A.2d 399 (1977); *Tower Plaza Investments, Ltd. v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973), *app. dism.*, 414 U.S. 1118 (1974); *Apache Gas Products Corp. v. Oklahoma Tax Commission*, 509 P.2d 109 (Okla. 1973); *H & B Communications Corp. v. Richmond*, 79 Wash.2d 312, 484 P.2d 1141 (1971); *State v. Minneapolis and St. Louis Railway Co.*, 257 Minn. 124, 100 N.W.2d 669 (1960); *Penn Mutual Indemnity Co. v. Commissioner*, 277 F.2d 16 (3rd Cir. 1960); and *California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959), *app. dism.*, 364 U.S. 285 (1960).

6. THE DIRECTOR'S ARGUMENT THAT THE 1982 AMENDMENT TO 49 U.S.C. § 1513 SUPPORTS THE VALIDITY OF THE HAWAII TAX IS ERRONEOUS.

On September 3, 1982, 49 U.S.C. § 1513 was amended by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, 96 Stat. 324), Title V of which is the Airport and Airway Improvement Act of 1982 (96 Stat. 671-702). The principal change was the addition of a new subsection (d). In addition, the language of subsection (b) was slightly modified to reflect the addition of subsection (d). The full text of 49 U.S.C. § 1513, including the 1982 amendment, is reprinted in the appendix to Appellant's Brief Opposing Motion to Dismiss or Affirm, filed by Aloha Airlines, at App. 1.

The Director has argued that this amendment renders this case moot, and that the amendment supports the Director's contention that the Hawaii tax is not prohibited by 49 U.S.C. § 1513. See Director's Motion to Dismiss or Affirm, at 9.

Even the Director concedes, as he must, that the 1982 amendment does not apply to tax years prior to the date of enactment, September 3, 1982. Since this case expressly concerns tax years 1974 through 1977, it simply cannot be true, as the Director asserts, that the question raised by this litigation is "moot."

More importantly, the 1982 amendment provides no support for the validity of the Hawaii tax. To begin with, neither 49 U.S.C. § 1513(a) nor the relevant language in § 1513(b) are affected by the amendment. The relationship between those two provisions, therefore, and in particular the subordination of subsection (b) to subsection (a), remains unchanged. Nothing in the 1982 legislation authorizes a tax on gross receipts, whether or not characterized for any purpose as a "property" tax.

Instead, the change in the statute is the addition of subsection (d), which identifies specific state taxes which are forbidden by Congress as unreasonably burdensome on interstate commerce. Subsection (d) does not modify or alter in any way the prohibition against a tax on gross receipts stated in subsection (a).

Indeed, part of subsection (d) might even serve as a second and additional provision to forbid the application of Hawaii's tax in future years. Subsection (d) adds a prohibition against certain "ad valorem" property taxes which might have been permissible prior to the date of the 1982 amendment.[15] The relevant portion of 49 U.S.C. § 1513(d) states as follows:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them: . . .
>
> (C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

As noted above, Hawaii does not have a personal property tax today, did not have one in 1963 when the Hawaii tax statute at issue here was enacted, and has not had one since 1947. In comparison with "the tax rate applicable to commercial and

---

[15] Actually, whether or not the Hawaii tax could for any purpose be deemed to be a property tax, it could not be deemed to be an "ad valorem" property tax, as no property valuation is involved in the determination of the tax. For discussions of what constitutes an "ad valorem" property tax, see generally *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 447 (1940) (Roberts, J., dissenting); *Virginia v. Imperial Coal Sales Co., Inc.*, 293 U.S. 15, 18 (1934).

industrial property in the same assessment jurisdiction," which is zero, any so-called "property" tax applied to the airline is obviously larger, so it would seem contrary to the 1982 legislation.

The Director has claimed otherwise by arguing in his motion, at page 10, that the Hawaii tax "is clearly nondiscriminatory as the tax is levied equally upon all Hawaii public service carriers." But that is the wrong comparison, and the 1982 amendment expressly says as much. The relevant portion of § 1513(d)(2) states:

> (2) In this subsection— . . .
>
> (D) "commercial and industrial property" means property, *other than transportation property* and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy . . . (emphasis added)

The proper comparison is not with motor carriers, as the Director has suggested, but rather with other commercial and industrial property. Since there is no personal property tax, the application of any tax of this sort on an airline would seem antithetical to the 1982 amendment.

More importantly, for the present case, it is plain that the thrust of the 1982 legislation is contrary to the Hawaii tax. The addition of subsection (d) indicates that what Congress had in mind when it included "property tax" within the terms of subsection (b) was a traditional ad valorem tax, not a tax measured by gross receipts like Hawaii's. Further, it demonstrates that Congress intended to permit only those property taxes which treated airlines like other businesses generally, not one which singles them out for taxation, like Hawaii's. Far from justifying the imposition of the Hawaii tax, then, the 1982 legislation strengthens the case against it.

CONCLUSION

The interpretation of 49 U.S.C. § 1513 offered by the Supreme Court of Hawaii is contrary to the plain language of that statute and vitiates it. The decision is contrary to the legislative history of the federal statute at issue and puts in jeopardy the important federal program to promote civil aviation. The decision of the Supreme Court of Hawaii must be reversed.

Respectfully submitted,

RICHARD L. GRIFFITH
MICHAEL A. SHEA
RICHARD R. CLIFTON
CADES SCHUTTE
FLEMING & WRIGHT
Attorneys for Appellant
ALOHA AIRLINES, INC.

March 1983